Supreme Court, U.S.
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No. 98-780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DR. MARJORIE C. McMILLAN,

Petitioner,

vs.

MASSACHUSETTS SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, DR. GUS THORNTON and DR. PAUL GAMBARDELLA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS MASSACHUSETTS SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS AND DR. GUS THORNTON

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction to consider Petitioner's appeal, where Petitioner has failed to raise the Seventh Amendment issue in the United States Court of Appeals for the First Circuit under circumstances requiring it?

2. Whether the decision of the United States Court of Appeals for the First Circuit, applying Fed. R. Civ. P. 50 and vacating the punitive damages and lost benefits awards based on insufficient evidence, violates the Seventh Amendment?

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Respondent, Massachusetts Society for the Prevention of Cruelty to Animals, hereby discloses that it has no parent or subsidiary companies.

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Appendix A — Order Of The United States Court Of Appeals For The First Circuit Denying The Petition For A Writ Of Mandamus Dated And Entered November 25, 1998 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The District Of Massachusetts On Reconsideration Of Plaintiff's Petition For Costs And Attorneys' Fees Dated And Docketed October 28, 1998 ..... 3a

Appendix C — Excerpts Of Respondents' Brief In The United States Court Of Appeals For The First Circuit Dated and Filed June 6, 1997 ..... 8a

Respondents hereby oppose the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit (the "First Circuit").

COUNTERSTATEMENT OF JURISDICTION

As set forth below, this Court lacks jurisdiction to hear the appeal because, despite the clear ruling of the First Circuit on punitive damages and lost benefits implicitly applying a Fed. R. Civ. P. 50 standard, Petitioner failed to properly raise the Seventh Amendment issue before the First Circuit.

COUNTERSTATEMENT OF THE CASE

This case was tried to a jury in the United States District Court for the District of Massachusetts (the "trial court") in December 1995. The jury returned a verdict in Petitioner's favor on her Massachusetts General Laws, chapter 151B claim.[1] After trial, Respondents filed post-trial motions pursuant to both Fed. R. Civ. P. 50 and 59 seeking, *inter alia*, to vacate Petitioner's punitive damages award and reduce her back pay award by 21%, the value of the benefits Petitioner allegedly lost because she was paid less than her male counterparts. In their Motion For Judgment As A Matter of Law ("Rule 50 Motion"), Respondents argued that the trial court should set aside the punitive damages and lost benefits awards because Petitioner offered insufficient evidence that she was entitled to them. (J.A.[2] at 501-503). In their Motion for New Trial ("Rule 59 Motion"), Respondents argued, in the alternative, that the awards were excessive and against the weight of the evidence. (J.A. at 498-500). The trial court denied the Rule 50 Motion with respect to these damages issues on the ground that Respondents had failed to address them in their Rule 50 Motion

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1. The jury also returned a verdict in Petitioner's favor on her claim for tortious interference with contractual relations. The trial court granted Respondents' Fed. R. Civ. P. 50 Motion on this count and the First Circuit affirmed.

2. "J.A." refers to the Joint Appendix filed with the First Circuit.

at the conclusion of Petitioner's case and, therefore, had waived them. (P.A.[3] at 53a). The trial court denied the Rule 59 Motion on the merits. (P.A. at 56a-59a).

The Respondents appealed the trial court's rulings on the Rule 50 and 59 Motions to the First Circuit. Respondents restated their position to the First Circuit that Petitioner had not offered sufficient evidence, as a matter of law, that she was entitled to punitive damages or lost benefits. (R.A.[4] at 8a-10a). Petitioner did not challenge Respondents' appeal of the trial court's denial of their Rule 50 Motion on punitive damages and only argued that the trial court did not abuse its discretion. (Brief of Plaintiff/Appellee at 25-26). Moreover, Petitioner did not argue that Respondents had waived their Rule 50 Motion as to either punitive damages or lost benefits. (*Id.* at 23-26). In the alternative, Respondents requested that they be granted a new trial on these issues. (R.A. at 8a-10a).

In its March 18, 1998 opinion, the First Circuit vacated the punitive damages award on the basis that Petitioner failed to offer sufficient evidence at trial to support a punitive damages award as a matter of law, implicitly reversing the trial court's denial of the Respondents' Rule 50 Motion.[5] The First Circuit exercised its well established authority to "review the record to determine whether a *reasonable jury could have found* defendants' conduct *sufficiently worthy* of *condemnation* and *deterrence* to justify exemplary damages." (P.A. at 33a) (emphasis supplied). The First Circuit then held:

> [*W*]*e cannot say* on the basis of the record before us, that Dr. Thornton's and the MSPCA's *intentional misconduct* calls for *punishment* and *deterrence beyond that secured by the compensatory award.* Determining what rises to

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3. "P.A." refers to Petitioner's Appendix attached to the Petition for Writ of Certiorari.

4. "R.A." refers to the Respondents' Appendix attached hereto.

5. Although the First Circuit does not cite Fed. R. Civ. P. 50 in its opinion, its analysis leaves no doubt as to the standard applied.

> the level at which an award of punitive damages is appropriate is a difficult task, but *the evidence shows that the actions at issue in this case do not.*[6]

Id. (emphasis supplied).

Having determined that there was insufficient evidence for a punitive damages award as a matter of law, the First Circuit appropriately vacated the punitive damages award. The First Circuit did not perform an excessiveness analysis or discuss remand, recalculation, reduction, remittitur or the Petitioner's entitlement to a new trial. The First Circuit did not find that the trial court abused its discretion. In its conclusion, the First Circuit simply stated that "[W]e *vacate* the jury's award of punitive damages." (P.A. at 45a).

Likewise, the First Circuit explicitly held that Petitioner was not entitled to recover lost benefits as part of her back pay award because she failed to offer legally sufficient evidence at trial that she had incurred these damages:

> . . . [P]laintiff presented *no evidence* that she incurred insurance expenses. In addition she presented *no evidence* that any employer-contributed retirement benefits were tied to the amount of her salary. . . . *Because there was no competent evidence from which a reasonable jury could conclude that Dr. McMillan suffered any loss in benefits as a result of her lower salary*, Dr. McMillan's back pay award should be accordingly reduced by the amount of the lost benefits award.

(P.A. at 29a-30a) (emphasis supplied). The First Circuit vacated the amount of the back pay award allocated to lost benefits and remanded to the trial court the recalculation of back pay damages. (P.A. at 45a).

On April 1, 1998, Petitioner filed a Petition for Rehearing and Suggestion of Rehearing In Banc and a memorandum in support

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6. Petitioner's characterization that the First Circuit vacated the punitive damages award because it was "grossly excessive" and "shock[ing] to the conscience," (Petition at 5), takes the First Circuit's words out of context and is a misrepresentation of that decision.

thereof ("Petition for Rehearing"), in which she extensively argued that the First Circuit erred in vacating the punitive damages award in light of a newly decided Supreme Judicial Court decision, *Dartt v. Browning-Ferris Indus*, 427 Mass. 1, 691 N.E. 2d 526 (1998). Specifically, Petitioner argued that the evidence presented at trial was *legally sufficient* to support a punitive damages award in light of *Dartt's* ruling that punitive damages are warranted under Massachusetts General Laws, chapter 151B when the defendant's intentional discrimination has been undertaken with the knowledge of its illegality. Petitioner contended that the First Circuit "ignored proven evidence" of Respondents' knowledge that their conduct was illegal. She further argued that the First Circuit "wrongly assumed that [Petitioner] relied solely on the finding of intentional discrimination, standing alone, to support the punitive damages award." (Memorandum in Support of Petition for Rehearing, and Suggestion for Rehearing In Banc, of Plaintiff/Appellee at 9-10). Petitioner requested that the First Circuit "reinstate" the punitive damages award. (*Id.* at 12). Petitioner *did not seek* a remand for remittitur or a new trial, although she argued that the jury's award was not excessive, ostensibly using a Rule 59 standard. (*Id.* at 10-12). On June 16, 1998, Petitioner filed supplemental authority with the First Circuit in further support of her contention that there was legally sufficient evidence to support a punitive damages award.

Nowhere in these extensive filings before the First Circuit did Petitioner raise, or even mention, that the First Circuit decision, vacating the punitive damages and lost benefits awards, violated the Seventh Amendment. On June 16, 1998, the First Circuit denied the Petition for Rehearing.[7] (P.A. at 45a-46a).

On July 31, 1998, over four months after the First Circuit issued its opinion, and subsequent to her filing the Petition for Rehearing, Petitioner filed motions with the trial court, including her Motion for Remittitur on Punitive Damages with Alternative for a New Trial, ("Motion for Remittitur") (collectively "Post Appeal Motions"). In the Post Appeal Motions, Petitioner argued *for the first time* that: (1) the First Circuit reversed the trial court's denial of Respondents'

7. Pursuant to Fed. R. App. P. 35(b) and 40(a), Respondents did not file an opposition because the First Circuit did not request them to do so.

Rule 59 Motion and intended to remand the punitive damages award to the trial court for a remittitur or, alternatively, a new trial pursuant to the Seventh Amendment's Re-Examination Clause and this Court's holding in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996) ("Gasperini"); and (2) for the same reason, she was entitled to remittitur of the lost benefits award or a new trial.

On October 6, 1998, the trial court denied Petitioner's Motion for Remittitur, ruling:

> The *First Circuit was clear* in its holding that *no reasonable jury* could have found defendants' conduct "sufficientley [sic] worthy of condemnation and deterrence to *justify exemplary damages*" and that a *compensatory award was all that plaintiff was entitled to.*

(P.A. at 60a) (emphasis supplied).

On October 28, 1998, the trial court also denied Petitioner's motion for a new trial on the lost benefits issue, ruling:

> The *direction of the First Circuit panel with respect to the employee benefit award is unambiguous*: "*Because there was no competent evidence from which a reasonable jury could conclude that Dr. McMillan suffered any loss in benefits as a result of her lower salary*, Dr. McMillan's back pay award should be accordingly reduced by the amount of the lost benefits award." 140 F.3d at 305-306. *Plaintiff's belated attempt to marshal such evidence comes too late.*

(R.A. at 4a) (emphasis supplied).

Undeterred, Petitioner filed a Petition For Writ of Mandamus in the First Circuit seeking to have the trial court grant her a remittitur or new trial on the punitive damages issue.[8] On November 25, 1998, while this Petition for Writ of Certiorari was pending, the First Circuit

8. Petitioner did not seek to have the First Circuit order the trial court to grant a new trial on the issue of her entitlement to lost benefits.

denied the Petition For Writ of Mandamus, stating in no uncertain terms that it intended to vacate the punitive damages award because Petitioner did not offer legally sufficient evidence at trial to support it:

> Petitioner seeks a writ of mandamus directing the district court to afford her a remittitur in her punitive damages award or the option of a new trial. She contends that, as part of our disposition of the recent appeal . . . this court intended that such relief would be provided on remand. *To the contrary, our intention was that judgment enter for defendants on the punitive damages issue. And we think the language of the opinion . . . made this clear. See, e.g., id.* at 295 ("[w]e . . . reverse the award of punitive damages"); *id.* at 307 ("we cannot say, on the basis of the record before us, that [defendants'] intentional misconduct calls for punishment and deterrence beyond that secured by the compensatory award"). *Petitioner has thus failed to establish any basis for the requested relief*, much less a "clear entitlement" thereto as is required for the extraordinary writ of mandamus. . . .

(R.A. at 1a-2a) (emphasis supplied).

REASONS FOR DENYING THE WRIT

This Court should deny the Writ. This Court lacks jurisdiction to hear the appeal because Petitioner failed to properly raise the Seventh Amendment issue before the First Circuit in her Petition for Rehearing.

Assuming, *arguendo*, that this Court has jurisdiction, the record establishes that the First Circuit vacated the punitive damages and lost benefits awards by granting Respondents' Rule 50 Motion in substance. It is well established, and conceded by Petitioner, that appellate review of a denial of a Rule 50 Motion does not violate the

Seventh Amendment's Re-Examination Clause. *Neely v. Eby Construction Co.*, 386 U.S. 317, 321-322 (1967), *reh'g denied*, 386 U.S. 1027 (1967). Likewise, it is undisputed that upon an appellate court's reversal of a trial court's denial of a Rule 50 Motion, the appellate court has the authority to enter judgment thereon. *Id.* at 321-323.

Petitioner's entire argument rests on the premise that the First Circuit vacated the punitive damages and lost benefits awards on the ground that the trial court had abused its discretion in denying Respondents' Rule 59 Motion. Her position is utterly without support in the record. To sustain her Petition, Petitioner resorts to convoluted arguments and a tortured reading of the First Circuit's opinions. In a less than subtle manner, Petitioner attempts to create confusion as to the First Circuit's opinion and decision where none, in reality, exists. The First Circuit's decision to vacate punitive and lost benefits damages, using the Rule 50 standard, could not have been clearer, and for this reason, this Court should deny the Writ.

I.

THIS COURT LACKS JURISDICTION TO CONSIDER PETITIONER'S APPEAL.

This Court lacks jurisdiction to hear Petitioner's appeal. Petitioner failed to assert her Seventh Amendment argument before the First Circuit after its decision. Critically, Petitioner omitted, without any reason, a discussion of the alleged Seventh Amendment implications from her Petition for Rehearing.

In her Petition for Rehearing, Petitioner argued that the First Circuit had erred because there was *legally sufficient evidence* to support the punitive damages and lost benefits awards. Petitioner chose not to raise her Seventh Amendment arguments before the First Circuit in the Petition for Rehearing (even though she argued that the jury's award was not excessive), and, as a matter of law, has waived her right to do so now. As a rule, this Court will *not* grant certiorari to decide an issue that was *not* raised in the proceedings below.

See Pennsylvania Department of Corrections v. Yeskey, __ U.S. __, 118 S. Ct. 1952, 1956 (1998) ("Where issues are neither raised before nor considered by the court of appeals, this Court will ordinarily not consider them.").[9]

Petitioner's failure to raise her Seventh Amendment concerns earlier denied the First Circuit any opportunity to consider this issue, and constitutes a waiver. This Court should not grant certiorari to review such an unpreserved claim.[10]

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9. It is only under "extraordinary circumstances" that this Court grants review of issues not raised below. This Court has found the existence of "extraordinary circumstances" where: (i) the unraised issue is a necessary "predicate to an intelligent resolution of the question on which certiorari was granted," *see Cuyler v. Sullivan*, 446 U.S. 335, 342-343, n.6 (1980); (ii) the unraised issue is essentially part of the preserved issue on which certiorari was granted, *see Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 277 n.23 (1989); (iii) the unraised issue is an important, recurring public policy issue, *see Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980); or (iv) there has been "a substantial intervening change in controlling law," *see Sure-Tan, Inc. v. National Labor Relations Board*, 467 U.S. 883, 896 n.7 (1984). Such "extraordinary circumstances" do not exist here.

10. Petitioner will likely argue that she raised the Seventh Amendment issue before the First Circuit by filing the Petition for Writ of Mandamus. However, this argument must fail. In her Petition for Rehearing, Petitioner argued that the First Circuit erred, using either a Fed. R. Civ. P. 50 or Fed. R. Civ. P. 59 standard, without raising her Seventh Amendment concerns. Her belated contention that the First Circuit violated the Seventh Amendment is nothing more than litigation afterthought. Moreover, Petitioner cannot now argue that the trial court had jurisdiction to consider the Post Appeal Motions. The general proposition that a trial court is "bound to carry the mandate of the upper court into execution and could not consider the questions which the mandate laid at rest — is indisputable." *Sprague v. Ticonic National Bank*, 307 U.S. 161, 168 (1939). In this case, the trial court on remand only had jurisdiction to vacate the damages awards. It is well established that an appellate court is prohibited from using a writ of mandamus to compel a lower court to act outside its prescribed jurisdiction. *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976). Insofar as the trial court lacked jurisdiction to consider the Post Trial Motions, the First Circuit was prohibited from considering whether to have the trial court remit or order a new trial.

II.

THE FIRST CIRCUIT'S DECISION DID NOT VIOLATE THE SEVENTH AMENDMENT.

This Court should deny the Writ because there is no constitutional issue at stake. The First Circuit vacated the punitive damages and lost benefits awards, using the Rule 50 standard, because Petitioner failed to offer sufficient evidence at trial to support the jury's verdict. This Court's precedent clearly vests in the First Circuit the constitutional authority to vacate the damages awards on the ground of lack of sufficiency of evidence and Petitioner concedes as much.

A. It Is Well Established That The Seventh Amendment Is Not Implicated In A Rule 50 Context.

Petitioner's reliance on *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996) and *Hetzel v. Prince William County*, __ U.S. __, 118 S. Ct. 1210 (1998), *reh'g denied*, 118 S. Ct. 2336 (1998), is misplaced. *Gasperini*, *Hetzel* and their progeny, involve appellate review of a trial court's denial of a Rule 59 motion for new trial based on an excessive jury verdict, not appellate review of a trial court's denial of a Rule 50 motion for judgment as a matter of law. This is a fatal distinction, as Petitioner readily concedes. (Petition at 12-14).

In *Gasperini*, 518 U.S. at 436, the Second Circuit Court of Appeals ("Second Circuit") reversed the trial court's denial of a Rule 59 Motion because it did not properly apply a state statute limiting jury verdicts. It then remitted the damages award. This Court held that while the Seventh Amendment did not preclude an appellate court from reviewing a trial court's denial of a motion to set aside a jury verdict as excessive, its review was limited to an abuse of discretion standard. *Id.* at 433-436. This Court then reversed the Second Circuit's holding and remanded the case with instructions that the trial court apply the state statutory standard. *Id.* at 439.

Gasperini is limited by its facts. In *Gasperini*, this Court only considered the scope of appellate review of a motion for a new trial.

Id. at 431-438. The respondent in that case had not made any motion for judgment as a matter of law, and thus could only appeal from the denial of his motion for new trial. *Id.* at 415, 420. *Gasperini* has no relevance where, as here, the First Circuit entered judgment for Respondents as a matter of law pursuant to Fed. R. Civ. P. 50.

It cannot be reasonably disputed that appellate review of a Rule 50 motion for judgment as a matter of law is compatible with the Seventh Amendment. *Neely v. Eby Construction Co.*, 386 U.S. 317, 321-322 (1967). The Seventh Amendment's Re-Examination Clause is not implicated by appellate review of a Rule 50 Motion because such review consists of applying a legal standard of sufficiency of the facts and determining whether the issue should have been decided by the court, and not the jury. *See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696-702 n.6 (1962). By contrast, appellate review of a Rule 59 Motion to set aside a jury verdict as excessive is, in effect, an appellate court's reexamination or reweighing of the jury's factual findings against the evidence set forth in the record, *Barry v. Edmunds*, 116 U.S. 550, 565 (1886), using an abuse of discretion standard. *Grunenthal v. Long Island R.R. Co.*, 393 U.S. 156, 164 (1968).

This Court decided over three decades ago that once an appellate court reverses a trial court's denial of a Rule 50 Motion, the appellate court has the authority to enter judgment thereon, without remanding the case for remittitur or a new trial. *Neely v. Eby Construction Co.*, 386 U.S. at 321-323. In *Neely*, this Court explicitly held:

> The question here is whether the Court of Appeals, after reversing the denial of a defendant's Rule 50(b) motion for judgment notwithstanding the verdict, may itself order dismissal or direct entry of judgment for defendant. *As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment n.o.v. than when a trial court does, consequently, there is no constitutional bar to an appellate court granting judgment n.o.v.* . . . . Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad

> enough to include the power to direct entry of judgment n.o.v. on appeal.

Id. (emphasis supplied); *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489-491 (1977)(On appeal of a Rule 50 Motion, this Court determined that there was insufficient evidence at trial to support the damages claims and entered judgment thereon as a matter of law, without remand for remittitur or a new trial.).[11]

Petitioner concedes that appellate review of the legal sufficiency of a plaintiff's evidence is appropriate and constitutionally permissible. (Petition at 12). Specifically, Petitioner admits that if the First Circuit's decision on the damages issues was based on "legal insufficiency" and was, in fact, a holding that the damages issues should not have been put to the jury, it was an appropriate use of appellate power consistent with the Seventh Amendment, and *Gasperini* is inapplicable.[12] (Petition at 12-14).

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11. This Court's decision in *Hetzel* supports Respondents' position rather than Petitioner's insofar as it recognized the authority of an appellate court to review a trial court's denial of a motion under Fed. R. Civ. P. 50, and to enter judgment thereon. *Hetzel*, 118 S. Ct. at 1212.

12. Petitioner further argues that the First Circuit's decision on punitive damages could not have been based on legal insufficiency of the evidence and thus Respondents' Rule 50 Motion. Petitioner concludes that she satisfied her burden of proof on punitive damages, (Petition at 12-13, n.9 & 10), a contention expressly rejected by the First Circuit on rehearing. (P.A. at 45a-46a). The merits of this argument are irrelevant, however, because its resolution raises a unique question of state law which should not be decided by this Court. *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this court's review") Moreover, this Court has already granted certiorari in *Kolstad v. American Dental Association*, 139 F.3d 958 (D.C. Cir. 1998), *cert. granted*, __ U.S. __, 119 S. Ct. 401 (1998), in order to determine the legal standard for punitive damages under Title VII, the federal counterpart to Massachusetts General Laws, chapter 151B, where a federal question exists. In any event, Petitioner has not sought review by this Court of the First Circuit's decision to vacate the damages awards on the basis of Respondents' Rule 50 Motion.

Therefore, because the First Circuit held that there was insufficient evidence as a matter of law for a reasonable jury to have awarded punitive damages or lost benefits, the First Circuit's rulings on these issues constituted a reversal of the trial court's denial of Respondents' Rule 50 Motion as to those issues. Accordingly, the First Circuit's decision, setting aside the punitive damages and lost benefits awards, did not implicate the Re-Examination Clause of the Seventh Amendment, nor conflict with this Court's rulings in *Gasperini* and *Hetzel*.

B. The First Circuit Vacated the Punitive Damages and Lost Benefits Awards Because Petitioner Failed To Offer Legally Sufficient Evidence To Support Them.

Petitioner's entire premise rests on her flawed assumption that the First Circuit ruled on Respondents' Rule 59 Motion rather than their Rule 50 Motion when it vacated the punitive damages and lost benefits awards. This premise is erroneous and unsupported in the text of the First Circuit's opinions.

The First Circuit's opinion used unambiguous language to vacate the damages awards on the ground that Petitioner had offered legally insufficient evidence to support them. The First Circuit found that Respondents' conduct was not "sufficient[ly] worthy of condemnation and deterrence," (P.A. at 33a), and vacated the punitive damages for that reason. The First Circuit did *not* analyze whether or not the verdict was excessive, did *not* find that the trial court abused its discretion and did *not* discuss remand, recalculation, reduction, remittitur or Petitioner's entitlement to a new trial.[13] In vacating the lost benefits award, the First Circuit reasoned, even more clearly, that it relied on a Rule 50 standard, when it opined that there was "no competent evidence from which a reasonable jury could conclude that [Petitioner] suffered any loss in benefits as a result of her lower salary." (P.A. at 29a-30a).

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13. Petitioner argues that the First Circuit's failure to conduct an excessiveness review or abuse of discretion analysis is a constitutional violation. (Petition at 14-16). She ignores the obvious: these reviews were unnecessary because the First Circuit decided the damages issues using a Rule 50 standard.

Petitioner also argues that Respondents did not properly appeal from the trial court's denial of its Rule 50 Motion, and therefore Respondents' "only viable challenge on appeal was to the district court's denial of the new trial motion." (Petition at 16-17). While Petitioner is entitled to her opinion, her position is without merit. To make that argument, Petitioner misrepresents the procedural history of the case. She fails to advise this Court that: (i) Respondents actually appealed from the trial court's denial of their Rule 50 Motion, (R.A. at 8a-10a); (ii) she did not challenge this procedural aspect of the Respondents' appeal; and (iii) she failed to argue the issue of Respondents' alleged waiver in her appellate brief. It must be inferred from the First Circuit's ruling that it rejected the trial court's decision on waiver. *See Sprague v. Ticonic National Bank*, 307 U.S. 161, 168-169 (1939); *Commercial Union Ins. Co. v. Walbrook Ins. Co.*, 41 F.3d 764, 770 (1st Cir. 1994) (The reviewing court's mandate "constitutes the law of the case on such issues of law as were actually considered and decided by the appellate court or were necessarily inferred from the disposition on appeal.") Petitioner presented the same old waiver argument, *verbatim*, to the trial court in her Post Appeal Motions (Plaintiff's Outline of Tasks on Remand at 2, n.1; Motion for Remittitur at 1-3, n.1), and the First Circuit in the Petition for Writ of Mandamus (Petition for Writ of Mandamus at 2-3, n.1 & 2). Both the First Circuit and the trial court on remand directly rejected the notion that the First Circuit could not have vacated the damages awards using a Rule 50 standard on the ground of Respondents' waiver. In any event, Petitioner does not seek to appeal the First Circuit's decision reversing the trial court's finding on waiver, and the issue is not before this Court.

Petitioner immediately understood that the First Circuit reversed the trial court's denial of the Respondents' Rule 50 Motion because, without explicitly saying so, it applied a Rule 50 standard. This is why Petitioner argued in her Petition for Rehearing that the First Circuit erred because she had offered legally sufficient evidence at trial supporting the punitive damages award. Although Petitioner also argued in her Petition for Rehearing that the jury award was excessive, she never addressed the Seventh Amendment argument, nor asked for any relief other than the *reinstatement of the verdicts*. Nowhere did she pray for a remand for remittitur or, alternatively, a new trial.

As a result, Petitioner cannot rely, as she purports to do, on *Hetzel v. Prince William County*, 118 S. Ct. 1210 (1998). In *Hetzel*, the Fourth

Circuit Court of Appeals ("Fourth Circuit") reversed the punitive damages award and remanded the case to the trial court for a recalculation of damages within a specific range. *Id.* at 1210. The Fourth Circuit's opinion gave no indication that it intended the trial court to deviate from the normal practice of affording a new trial option should the recalculated damages award be rejected. *Id.* at 1211, n.2. The plaintiff filed a petition for writ of certiorari but did not argue that the Fourth Circuit's mandate to the district court constituted a violation of the Seventh Amendment. *In Re: Board of County Supervisors of Prince William County*, 143 F.3d 835, 836 (1998). This Court denied certiorari. *Id.* On remand, the trial court denied the plaintiff's motion for new trial, as an alternative to remittitur, and then reversed itself. *Id.* at 836-837. This ruling then caused the defendants to file a petition for writ of mandamus with the Fourth Circuit, which granted the Petition. *Id.* at 838-839. The plaintiff sought certiorari for a second time. The defendants argued that she had waived her rights because she failed to raise the Seventh Amendment in her first petition for writ of certiorari. *Hetzel*, 118 S. Ct. at 1211, n.2.

This Court held that it had jurisdiction to hear the case even though the plaintiff had not previously raised her Seventh Amendment claim. Because the Fourth Circuit's initial opinion seemed to follow the traditional remand for remittitur or new trial formula, it was not until the trial court interpreted the remand *not* to include a new trial option that the plaintiff became aware that her Seventh Amendment rights were implicated. *Id.* The plaintiff had not raised the claim when the first petition for certiorari was filed because, as this Court explained, she "reasonably construed" the Court of Appeals' decision as not depriving her of the right to a new trial. *Id.*

This case is readily distinguished. In no uncertain terms, the First Circuit vacated the punitive damages and lost benefits awards on the basis of a lack of sufficient evidence. Petitioner could *not* have reasonably construed the First Circuit's rulings and language in any other way, and, in fact, she did not (as evidenced by her arguments in the Petition for Rehearing). And yet, Petitioner manipulated the trial court unashamedly by filing her Post Appeal Motions *as if the First Circuit had remanded the damages awards for remittitur or, alternatively, a new trial.* She attempted to continue this manipulation

by then seeking review of the trial court's unequivocal rejection of these groundless Seventh Amendment issues before the First Circuit by way of a Petition for Writ of Mandamus. The purpose of this maneuvering was to enable her to cloak herself in *Hetzel* and *Gasperini*, as though Fed. R. Civ. P. 59, and not Fed. R. Civ. P. 50, was the basis of the First Circuit's opinion. This Court should not condone her abuse of the legal process by granting the Writ.

Shamelessly, Petitioner has not withdrawn this Petition after the First Circuit denied her Petition for Writ of Mandamus. In that opinion, the First Circuit directly rejected Petitioner's contention that the First Circuit intended to remand the damages award for remittitur, or alternatively a new trial. The First Circuit stated, in no uncertain terms, that its intent was that "judgment enter for defendants on the punitive damages." (R.A. at 1a). It described the language of its March 18, 1998 decision as "clear" and cited its prior language that it "reverse[d]" the award of punitive damages because Respondents' intentional misconduct did not "call for punishment and deterrence beyond that secured by the compensatory award." (R.A. at 1a-2a). The First Circuit concluded that Petitioner "failed to establish *any basis* for the requested relief." (R.A. at 2a) (emphasis supplied). "[T]he court that issues a mandate is normally the best judge of its content, on the general theory that the author of a document is ordinarily the authoritative interpreter of its purposes." *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940).

Even so, Petitioner still refuses to hear the message that she has lost her punitive damages and lost benefits awards. This Court should convince her by denying the Writ.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DENYING THE PETITION FOR A WRIT OF MANDAMUS DATED AND ENTERED NOVEMBER 25, 1998

United States Court of Appeals
For the First Circuit

No. 98-2150

IN RE:

MARJORIE C. MCMILLAN, DR.,

Petitioner,

Stahl, *Circuit Judge*,
Godbold* and Cyr, *Senior Circuit Judges*

ORDER OF COURT

Entered: **November 25, 1998**

Petitioner seeks a writ of mandamus directing the district court to afford her a remittitur in her punitive damages award or the option of a new trial. She contends that, as part of our disposition of the recent appeal, *see McMillan v. Massachusetts Society for the Prevention of Cruelty to Animals*, 140 F.3d 288 (1st Cir. 1998), this court intended that such relief would be provided on remand. To the contrary, our intention was that judgment enter for defendants on the punitive damages issue. And we think the language of the opinion (despite some admitted imprecision) made this clear. *See, e.g., id.* at 295

* Of the Eleventh Circuit, sitting by designation.

("[w]e . . . reverse the award of punitive damages"); *id.* at 307 ("we cannot say, on the basis of the record before us, that [defendants'] intentional misconduct calls for punishment and deterrence beyond that secured by the compensatory award"). Petitioner has thus failed to establish any basis for the requested relief, much less a "clear entitlement" thereto as is required for the extraordinary writ of mandamus. *See, e.g., In re Martinez-Catala*, 129 F.3d 213, 217 (1st Cir. 1997).

The petition for a writ of mandamus is denied.

By the Court:
[stamp] JANICE M. O'NEIL
Clerk.

cc: Messrs. Voltz, Cohn, Ms. Tearney & Ms. Rudavsky

Certified Copy to U.S. District Court Clerk, Tony Anastas
Certified Copy to Hon. Richard Stearns

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS ON RECONSIDERATION OF PLAINTIFF'S PETITION FOR COSTS AND ATTORNEYS' FEES DATED AND DOCKETED OCTOBER 28, 1998

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 92-11178-RGS

DR. MARJORIE C. MCMILLAN

v.

MASSACHUSETTS SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, DR. GUS THORNTON, and DR. PAUL GAMBARDELLA

MEMORANDUM AND ORDER ON RECONSIDERATION OF PLAINTIFF'S PETITION FOR AN AWARD OF COSTS AND ATTORNEYS' FEES

October 28, 1998

STEARNS, D.J.

The Appeals Court in *McMillan v. Massachusetts Society for the Prevention of Cruelty to Animals,* 140 F.3d 288 (1st Cir. 1998), directed this court to revise its amended judgment of November 15, 1996, in four respects: (1) by reducing the back pay award to Dr. McMillan by 21% (to $151,888) to reflect the fact that there was no evidentiary support justifying the jury's award of lost employee benefits; (2) by entering judgment

for the Massachusetts Society for the Prevention of Cruelty to Animals and Dr. Thornton on the claim for punitive damages; (3) by recalculating the award of attorneys' fees to reflect a lower billing for tasks that could have been performed by a less experienced attorney or legal assistant, rather than by Dahlia Rudavsky, plaintiff's lead counsel; and (4) by reconsidering the court's choice of 20% as an appropriate discount to reflect the allocation of attorney effort between successful and unsuccessful claims.

Plaintiff raises several ancillary issues that can be disposed of in summary fashion. The direction of the First Circuit panel with respect to the employee benefit award is unambiguous. "Because there was no competent evidence from which a reasonable jury could conclude that Dr. McMillan suffered any loss in benefits as a result of her lower salary, Dr. McMillan's back pay award should be accordingly reduced by the amount of the lost benefits award." 140 F.3d at 305-306. Plaintiff's belated attempt to marshal such evidence comes too late. Similarly, as I have previously ruled, there is no ambiguity in the Appeals Court's holding that a reasonable jury could not have found the defendants' conduct "sufficiently worthy of condemnation and deterrence to justify exemplary damages" and that the defendants' misconduct did not call "for punishment and deterrence beyond that secured by the compensatory award." 140 F.3d at 307. Plaintiff's argument that she is entitled to a remittitur is without merit as there is nothing to remit. Finally, there is no basis on which to award plaintiff as "liquidated" damages the sum awarded by the jury on her federal Equal Pay Act claim. As I instructed the jury (without objection): Dr. McMillan "is not entitled to collect twice under federal and state law for the same damages. I would like you to consider the state law issue separately from the federal claim,

that is, without considering any amount of money that might have been awarded under the federal claim. If you should award damages on both the state and federal counts, I will enter judgment for Dr. McMillan on whichever is the larger of the two awards." She was not then, and is not now, entitled to duplicative damages.

I have reviewed again the revised fee petition and the plaintiff's and defendants' responses to the Appeals Court's mandate regarding the reallocation of attorney hours. I have given line-by-line consideration to the disputed billings.[1] Of the hours billed by Ms. Rudavsky, I have identified 289.5 hours that could have been performed by an associate lawyer. Similarly, I have identified 32.6 hours of work that should more appropriately have been charged at a law clerk's rate, and 19.5 hours spent on tasks that could have been performed by a paralegal or legal secretary.[2] Consequently, I have reduced the revised fee request (before the discount)[3] to $496,381, substituting the hourly rates I had previously established for associates ($128), law clerks ($80), and legal assistants ($60), for the 341.6 hours that I have deemed inappropriately billed at the partner's rate ($285). To this sum I have added 25.4 hours at the partner's hourly rate of $285 to reflect time that I believe would have been reasonably spent by Ms. Rudavsky in tasking and supervising her hypothetical assistants, resulting in an

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1. By my calculation, I have devoted 19.2 hours to this task.

2. A number of these reallocations are not disputed by Ms. Rudavsky.

3. Defendants' methodology fails to recognize that the original award of $447,928 incorporated the 20% discount rejected by the Appeals Court.

award of attorneys' fees of $503,620. This figure, in turn, has been reduced by 8% to reflect effort spent on the unsuccessful and unrelated claims (breach of contract and infliction of emotional distress), resulting in a final award of $463,330 in attorneys' fees and $18,889 in costs.[4] Using a similar methodology, I have determined that Ms. Rudavsky should receive an additional award of $63,156 in supplemental fees and $390.68 in costs.[5]

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4. The Appeals Court rejected my original determination that a 20% deduction was a fair apportionment between successful and unsuccessful claims. In a footnote, it suggested that 3% might be an appropriate deduction, while acknowledging that the fee petition is not amenable to easy analysis. The 3% figure appears to be based solely on Ms. Rudavsky's estimate of the hours that she spent on the unsuccessful and unrelated claims. While I accept the judgment that 20% was too high a figure, I also believe from my experience with this prolonged case, that 3% is too low. I also believe that the defendants are correct that the total of hours expended is not the only consideration in selecting an appropriate discount. I have made the best choice that I can based on the entire record of the case. No more precise result can be achieved without undertaking further litigation (as defendants request) which will generate yet another disputed petition for attorneys' fees. I note parenthetically that plaintiff has not objected to the 20% deduction in the amount originally awarded for costs.

5. I have reallocated 66.9 hours of Ms. Rudavksky's time as follows: 56.5 hours to an associate's billing; 9.1 hours to that of a law clerk; and 1.3 hours to that of a legal assistant. I have added back in 5 hours of supervisor's time at the partner's rate. Although defendants object to the $10 an hour raise that Ms. Rudavsky has awarded herself and her subordinates, I do not find the adjustment unreasonable. I have made no percentage reduction in the amount awarded on Ms. Rudavsky's representation that she has deleted from the supplemental petition all time spent on the two unsuccessful claims, including time spent on the unsuccessful cross appeal.

Appendix B

ORDER

Plaintiff as the prevailing party shall within ten days of this Order submit a proposed Revised Amended Judgment consistent with this memorandum, the prior rulings of the court, and the decision of the Court of Appeals. Defendants shall have seven days to respond.

SO ORDERED.

s/ Richard G. Stearns
UNITED STATES DISTRICT JUDGE

APPENDIX C — EXCERPTS OF RESPONDENTS' BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED AND FILED JUNE 6, 1997

[p. 39 and pp. 41-42]

* * *

2. McMillan Is Not Entitled to Recover For "Lost Benefits" Because She Did Not Prove That She Lost Them.

The parties do not dispute that the jury added to McMillan's back pay award an additional 21% to represent the value of the "lost benefits" she purportedly suffered. McMillan testified at trial that she budgeted the value of these benefits for her supervisees at 21% of their salaries.[38] [A. 1226-1227] McMillan offered no evidence of any out of pocket loss. *Taylor v. Central Pennsylvania Drug and Alcohol Services Corp.*, 890 F. Supp. 360, 372 (M.D. Pa. 1995). Defendants are entitled to a remand for a recalculation of the back pay award, if the judgment is not vacated.

* * *

B. THIS COURT SHOULD SET ASIDE THE PUNITIVE DAMAGES AWARD AGAINST THE MSPCA AS A MATTER OF LAW OR GRANT DEFENDANTS A NEW TRIAL ON THIS ISSUE.

McMillan did not offer sufficient evidence, as a matter of law, that she was entitled to punitive damages. This Court has

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38. This was objected to and overruled. [A.1226-1227]. Defendants raised this issue in their posttrial motions. [A.492; 499; 502].

held that "intentional interference with [civil] rights, standing alone, is not enough [to permit punitive damages]; there must be *aggravating circumstances.*" *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205 (1st Cir. 1987) (quoting *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 121 (1st Cir. 1977) (emphasis added)). McMillan pointed to no aggravating circumstances. Even assuming this Court concludes that McMillan, as a matter of law, offered sufficient evidence of intent or pretext, there is still no evidence that was objectively overwhelming in nature, as is required by law. An award of $306,912.50 is not justified to punish the MSPCA, a charitable organization, or Thornton who, after all, made McMillan the Director of Radiology.

The punitive damages awarded in this case against the MSPCA and Thronton are grossly excessive, shocking to the conscience, and, as a matter of law, should be set aside. *See, e.g., Fishman v. Clancy*, 763 F.2d 485, 489 (1st Cir. 1985).

Defendants further contend that by permitting the jury to hear *irrelevant evidence* of the matter in which McMillan felt she was treated by Gambardella, the jury's consideration of the punitive damages issue was impermissibly tainted. The jury heard testimony concerning Gambardella's termination of McMillan, including how he interrupted a procedure, gave her 15 minutes to leave the building and refused her access to Angell subsequently. The jury was apparently outraged.[41] They found Gambardella liable for tortious interference. The court set aside that verdict holding that no reasonable jury could have concluded that Gambardella wrongfully interfered with McMillan's relationship with Angell. [AD.49-51].

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41. The Court concluded the jury ignored its instruction that the termination of McMillan was legally proper, [AD.9], and was so offended by it, it imposed liability on Gambardella.

Appendix C

In *Bain v. City of Springfield*, 424 Mass. 758, 678 N.E.2d 155 (1997), the Supreme Judicial Court ("SJC") considered whether the punitive damages awarded in a case of sex discrimination and retaliation case were excessive. The SJC remanded the case for a new trial on punitive damages because the jury was allowed to consider legally irrelevant elements in arriving at their award, such as the plaintiff's subjective descriptions of the defendant's appearance and conduct. *Id.* at 768-769, 678 N.E.2d at 162. For the same substantive reasons, defendants should be granted a new trial or the punitive damages award set aside.

* * * *